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6 MICHAEL STUDER and
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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 ENERKON SOLAR INTERNATIONAL, INC.,) Case No.: 2:21-cv-01122-JCM-VCF
11 Plaintiff,)
12 v.)
13 JOHN V. CAPPELLO, an individual;)
14 STUDEBAKER DISTRIBUTION CORP., a)
15 revoked Wyoming corporation; CATHY D.)
16 COLLINS, as trustee of STUDEBAKER)
17 DISTRIBUTION CORP and individually, VASTHI)
18 AVILA, an individual; STREAMWORX, LLC, a)
19 Wyoming revoked limited liability company;)
20 JONATHAN BAKER, as trustee of)
21 STREAMWORX, LLC and individually;)
22 EXCELSIOR CONSULTANTS, INC., a revoked)
23 Wyoming corporation; JEFF GREENEY, as trustee)
24 of EXCELSIOR CONSULTANTS, INC. and)
individually; SEA FRIENDS INCOPORATED, a)
New York non-profit corporation; MICHAEL)
STUDER, an individual; LUCIOUS GLENN, an)
individual; JOHN BAUSCHKA, an individual; DOE)
INDIVIDUALS 1 through 5; inclusive; and ROE)
BUSINESS ENTITITES 6 through 10, inclusive)
Defendants.

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1 COMES NOW, MICHAEL STUDOR and SEA FRIENDS INCOPORATED ("Defendants")
 2 by and through his counsel of record, THE AMIN LAW GROUP, NV, LTD., and file this instant
 3 Motion to Dismiss.

4 **I. INTRODUCTION**

5 On or about July 2, 2021, Plaintiff filed its First Amended Complaint with this Honorable Court.
 6 (#1). Plaintiff has named a host of parties, including Defendants as defendants in the action. However,
 7 the Complaint fails to sufficiently plead allegations to support a basis for recovery. Defendants are left
 8 to guess as to what the underlying allegations are because the Complaint is devoid of the basic who,
 9 what, where, when, and how of allegations.

10 **II. LEGAL ANALYSIS**

11 **A. Standards For Granting A Motion To Dismiss**

12 Federal Rule of Civil Procedure 12(b)(6) holds that dismissal is proper where there is either a
 13 "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable theory
 14 of law." *Balistreri v. Pacific Police Dept.*, 901 F. Supp. 2d 696, 699 (9th Cir. 1990).

15 When considering a motion to dismiss for failure to state a claim upon which relief can be
 16 granted, all material allegations in the complaint are accepted as true and are construed in the light most
 17 favorable to the non-moving party. *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 101-02 (1957);
 18 *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). It is essentially a ruling on a question of law.
 19 *North Star Int'l v. Arizona Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983). For the movant to succeed,
 20 it must appear to a certainty plaintiff will not be entitled to relief under the facts alleged in the
 21 complaint. *Halet v. Wend Invest. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982).

22 *Bell Atlantic Corp. v Twombly*. 550 U.S. 544, 127 S Ct. 1955 (2007) renders plain the minimum
 23 pleading requirements of stating a claim of relief that is "plausible on its face." *Twombly*, 127 S. Ct. at
 24 1974. The Court revised the standard and held a complaint should be dismissed if the plaintiff has failed
 25 to plead "enough facts to state a claim for relief that is plausible on its face" or does not "raise a right
 26 to relief above the speculative level." *Id.* at 1965, 1974. "A plaintiff is obligated to provide 'more than
 27 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.*
 28 at 1964-65; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009).

1 In analyzing Plaintiffs Complaint, this Court does need not assume the truth of Plaintiff's legal
 2 conclusions merely because they are cast in the form of factual allegations. *Ritzer v. Gerovicap*
 3 *Pharmaceutical Corp.*, 162 F.R.D. 642, 645 (D. Nev. 1995) (*citing Western Mining Counsel v. Watt*,
 4 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. (1981)). "A claim has facial plausibility when
 5 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 6 defendant is liable for the misconduct alleged." *Id.* at 1949. The well-pled facts must go beyond the
 7 "sheer possibility that a defendant has acted unlawfully" or facts that are "merely consistent with" a
 8 defendant's liability. *Id.*

9 In this case, among the problems, Plaintiff's allegations fail to establish claims under any of the
 10 legal theories propounded. Accordingly, dismissal is warranted.

11 **B. Dismissal Is Appropriate As Plaintiff Fails To State A Claim For Relief Because The**
 12 **Factual Allegations Are Vague And Ambiguous**

13 Plaintiff's Amended Compliant fails to include an "Allegations" section that lays out the factual
 14 allegations being made against the Defendant. Rather, the Amended Complaint simply identifies the
 15 various parties and then lists a host of causes of action. Furthermore, as to all but the third cause of
 16 action, Breach of Fiduciary Duty, none of the other causes of action identify which Defendants are
 17 potentially liable for which causes of action. Thus, this Defendant, and all other defendants, are left to
 18 simply guess what allegations concern them and which causes of action they could potentially be liable
 19 for. Defendants are therefore unable to provide sufficient answers to the pending allegations.

20 Moreover, Plaintiff's Complaint fails to make clear allegations in support of its claims. As to
 21 Defendant Studer, the sole allegation of Plaintiff's Complaint is a conclusory assertion that he was a
 22 former Secretary, Treasurer, and Chief Financial Officer of ENKS who issued shares of ENKS stock
 23 after he was removed as an officer in 2018. *See Complaint at Paragraphs 7-9.* Defendants vehemently
 24 deny this allegation.

25 The Federal Rules require that a plaintiff must allege "enough facts to state a claim to relief that
 26 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570. This requires more than
 27 "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id. at 555.*
 28 "A claim has factual plausibility when the plaintiff pleads factual content that allows the court to draw

1 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556
 2 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed. 868 (2009). Plaintiff's Complaint presents no
 3 meaningful facts that sufficiently describe the purported allegations. Defendants are left with an
 4 inability to sufficiently form a defense to the allegations unless specific factual assertions are made.
 5 Defendants are therefore entitled to dismissal of Plaintiff's Complaint as it does not sufficiently state a
 6 claim for relief.

7 **C. The 15 U.S.C. 78 Causes Of Actions Must Be Dismissed Because There Is No Private**
 8 **Right Of Action**

9 Plaintiff's Complaint includes two causes of action for violations for 15 U.S.C. 78. Both must
 10 be dismissed. The first cause of action complains that Defendants are liable under 15 U.S.C. 78o
 11 because they were allegedly not registered with the SEC to sell or purchase convertible notes.
 12 However, there is no private right of action under this statutory provision that would allow Plaintiff to
 13 bring this cause of action. Specifically, the Ninth Circuit has held, "that no private right of action is to
 14 be implied under this section." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1314 (9th Cir. 1982). Because
 15 there is no private cause of action under 15 U.S.C. 78o, only the SEC could bring action against these
 16 Defendants. Other individuals or companies, such as Plaintiff, are unable to sustain actions for these
 17 allegations. Thus, the first cause of action must be dismissed.

18 **D. The 15 U.S.C. 78 Causes Of Actions Must Be Dismissed Because The Complaint Does**
 19 **Not Meet The Heightened Standard Requirements**

20 Through the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress has
 21 imposed heightened pleading standards on securities fraud actions. 15 U.S.C. §§ 78u-4(b)(1), (2). "The
 22 PSLRA significantly altered pleading requirements in private securities fraud litigation by requiring
 23 that a complaint plead with particularity both falsity and scienter." *In re Vantive Corp. Sec. Litig.*, 283
 24 F.3d 1079, 1084 (9th Cir. 2002) (*citing Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001)). "The
 25 purpose of this heightened pleading requirement was generally to eliminate abusive securities litigation
 26 and particularly to put an end to the practice of pleading 'fraud by hindsight.'" *Id.* at 1084-85 (*citing In*
 27 *re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 973 (9th Cir. 1999)). To meet this heightened pleading
 28 requirement, the complaint must "specify each statement alleged to have been misleading, the reason

1 or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is
 2 made on information and belief, the complaint shall state with particularity all facts on which that belief
 3 is formed." *Id.* at 1085 (*citing* 15 U.S.C. §§ 78u-4(b)(1)).

4 The second requirement of the PSLRA is that the complaint must "state with particularity facts
 5 giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* (*citing* 15
 6 U.S.C. §§ 78u-4(b)(2)) (emphasis added). The Ninth Circuit has interpreted the scienter pleading
 7 requirement as meaning that plaintiffs "must plead, in great detail, facts that constitute strong
 8 circumstantial evidence of deliberately reckless or conscious misconduct." *Silicon Graphics*, 183 F.3d
 9 at 974. The *Silicon Graphics Court* further clarified that "recklessness only satisfies scienter under §
 10(b) to the extent that it reflects some degree of intentional or conscious misconduct." *Id.* at 977. The
 11 requisite recklessness must be an "extreme departure from the standards of ordinary care, and which
 12 presents a danger of misleading buyers that is either known to the defendant or so obvious that the actor
 13 must have been aware of it." *Id.* at 984. A plaintiff cannot proceed on pleadings averring scienter based
 14 on mere "motive and opportunity" but instead must "state specific facts indicating no less than a degree
 15 of recklessness that strongly suggests actual intent." *Id.* at 979.

16 In *Tellabs v. Makor Issues & Rights, Ltd.*, ___ U.S. ___, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007),
 17 the Supreme Court elaborated on the PSLRA's "strong inference" standard for pleading scienter.
 18 Agreeing with the standard in the Ninth Circuit, the Court held that:

19 "courts must consider the complaint in its entirety, as well as other sources courts ordinarily
 20 examine when ruling on Rule 12(b)(6) motions to dismiss The inquiry, as several Courts
 21 of Appeals have recognized, is whether all of the facts alleged, taken collectively, give rise to
 22 a strong inference of scienter, not whether any individual allegation, scrutinized in isolation,
 23 meets that standard." *Id.* at 2509 (emphasis in original).

24 Under the PSLRA "when determining whether plaintiffs have shown a strong inference of
 25 scienter, the court must consider all reasonable inferences to be drawn from the allegations, including
 26 inferences unfavorable to the plaintiffs." *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002).
 27 However, the "inference that the defendant acted with scienter need not be irrefutable, i.e., of the
 28 'smoking-gun' genre, or even the 'most plausible of competing inferences' [T]he inference of

1 scienter must be more than merely 'reasonable' or 'permissible'- it must be cogent and compelling, thus
 2 strong in light of other explanations." *Tellabs*, 127 S. Ct. at 2510. Thus, a "complaint will survive. . .
 3 only if a reasonable person would deem the inference of scienter cogent and at least as compelling as
 4 any opposing inference one could draw from the facts alleged." Id. (emphasis added).

5 Plaintiff's Complaint fails to make even the basic allegations to support its claims, much less
 6 the heightened standard required for the 15 USC 78j causes of action. To wit, the sole allegation
 7 articulated within Plaintiff's Complaint is a conclusory assertion that Defendant Studer was a former
 8 Secretary, Treasurer, and Chief Financial Officer of ENKS who issued shares of ENKS stock after he
 9 was removed as an officer in 2018.

10 The Supreme Court has enumerated the following elements of a cause of action for securities
 11 fraud arising under section 10(b) and rule 10b-5: (1) a material misrepresentation (or omission); (2)
 12 scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4)
 13 reliance, (5) economic loss; and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341,
 14 125 S. Ct. 1627, 1630-31, 161 L. Ed. 2d 577 (2005). Here, Plaintiff has failed to include even the basic
 15 who, what, where, when, and how of its causes of action, leaving Defendants to guess as to what the
 16 underlying allegations are. Accordingly, dismissal is appropriate.

17 **III. CONCLUSION**

18 For the foregoing reasons, it is respectfully submitted there is no valid cause of action to be
 19 brought against the Defendants based on the allegations of Plaintiff's Complaint. Accordingly,
 20 dismissal is appropriate.

21 DATED August 26, 2021.

22 **THE AMIN LAW GROUP, NV, LTD.**

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 MICHAEL STUDER and
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th of August 2021, I served a true and correct copy of:

**DEFENDANTS' MICHAEL STUDER AND SEA FRIENDS INCORPORATED'S
MOTION TO DISMISS PLAINTIFF ENERKON SOLAR INTERNATIONAL, INC.'S
FIRST AMENDED COMPLAINT**

Via the following methods of service:

- serving the following parties via US Mail, postage prepaid;

serving the following parties via e-mail;

serving the following parties via CM/ECF;

serving the following parties via facsimile;

serving the following parties via Overnight Express;

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Peter Gilmore

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